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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

GERALD J. VAN GEMERT and THE LAW OFFICES OF GERALD J. VAN GEMERT, a Professional Corporation,

Petitioner,

-v-

DREW LADICK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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62 pp

Questions Presented.

1. Does a common area maintenance assessment qualify as a "debt" within the Fair Debt Collection Practices Act, 15 U.S.C. §§1692 et seq. ("FDCPA"), where the assessment is statutorily imposed, no extension of credit is involved and there is no contractual, business or consensual arrangement concerning this assessment between the common interest development association and the separate interest owner?

2. Can the FDCPA's definition of "debt" encompass the collection of such common area maintenance assessments consistent with the Tenth Amendment to the federal Constitution where the State of California already has promulgated a comprehensive statutory scheme which closely regulates common interest developments and the collection of common area maintenance assessments?

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The petitioner Law Offices of Gerald J. Van Gemert is an independent professional corporation with no parent companies and no nonwholly owned subsidiaries.

Citations of Opinions and Orders.

The opinion of the United States Court of Appeals for the Tenth Circuit in *Andrew Ladick v. Gerald J. Van Gemert et al.*, _____ F.3d ____ (10th Cir. 1998), is set forth in the Appendix hereto (App. 1a-6a). The unpublished order of the United States District Court for the District of Colorado granting the petitioners' motion for summary judgment in *Andrew Ladick v. Gerald J. Van Gemert et al.*, is set forth in the Appendix hereto (A.7a-9a).

Basis For Jurisdiction in This Court.

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 9, 1998.

There has been no motion for rehearing or reconsideration or any other order granting an extension of time to file the petition for a writ of certiorari. This petition for writ of certiorari has been filed within ninety (90) days of June 9, 1998. 28 U.S.C. §2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

The Constitutional and Statutory Provisions Implicated By This Petition.

United States Constitution, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

This petition also involves the provisions of the Fair Debt Collection Practices Act, 15 U.S.C. §§162 et seq. The full text of this statutory scheme is set forth in the Appendix hereto (App. 10a-30a).

This petition also implicates the provisions of the Davis-Stirling Common Interest Development Act, California Civil Code, §§1350-1377 (1985). The relevant portions of that statutory scheme are set forth in the Appendix hereto (App. 31a-42a).

Statement of the Case.

The respondent Andrew Ladick ("Ladick") is an individual who has resided in Monument, Colorado at all the times pertinent to this civil action. Before moving to Colorado, Ladick had owned a condominium in a so-called common interest development in Rancho Santa Margarita, California, known as the Rancho Santa Margarita Landscape and Recre- ation Corporation ("SAMLARC"). This entity is a California corporation and is a homeowners' association which is em- powered by the Davis-Stirling Common Interest Develop- ment Act, California Civil Code, §§1350-1377 (1985), to budget,

levy and collect sufficient funds from the separate interest owners such as Ladick to maintain upkeep of the common areas (e.g., landscaping, streets, recreational facili- ties, etc.).

If a separate interest owner like Ladick fails to pay the assessment which SAMLARC has duly levied, it is required by the state's statutory scheme to notify the owner of the delinquent fees by certified mail, providing him with an itemized statement of the charges owed, "including items on the statement which indicate the principal owed, any late charges and the method of calculation, any attorney's fees, and the collecting practices used by the association, including the right of the association to the reasonable costs of collection." Cal. Civ. Code, §1367(b)(App. 40a).

If the owner still refuses to pay the common area maintenance assessments, the homeowners' association can then cause to be recorded with the county recorder of the county where the separate interest is located a so-called notice of delinquent assessment. Id. §1367(b)(App. 40a). This recorded notice by statute constitutes a lien on the owner's interest in the common interest development. Id.

After the expiration of thirty (30) days following the recor ding of the lien, the association may enforce the lien in any manner provided by law, including sale by the court, sale by the trustee designated in the notice of delinquent assessment, or sale by a substituted trustee Id. §1367(e)(App. 41a). But each one of these steps toward obtaining a deficiency judg ment against a separate interest owner such as Ladik is closely circumscribed by the statutory scheme and can only be accomplished in strict compliance therewith (App. 41a- 42a).

Importantly, the common area maintenance assessments are imposed upon separate interest owners like Ladick

automati cally under California's statutory scheme. That is, Section 1366(a) of the Davis Stirling enactment provides that the association "shall levy" such assessments; and section 1367 (a) provides that such assessments "shall be a debt of the owner of the separate interest at the time the assessment or other sums are levied" (App. 36a;39a). Thus neither Ladick as separate interest owner nor the homeowners' association may decide not to levy these assessments. Nor is it necessary that either or both to them assent to the imposition of such assessments. Instead, the assessments arise irrespective of agreement as a statutory incident of being a separate interest owner in a common interest development in California.

The petitioner Gerald J. Van Gemert ("Van Gemert") is an attorney engaged in the practice of law in California as the principal of the co-petitioner Gerald J. Van Gemert, a Profes sional Corporation. Van Gemert offers his legal services to common interest developments such as SAMLARC and part of his representation includes the collection of delinquent homeowners' association assessments through the courts of California.

Acting on behalf of SAMLARC, Van Gemert wrote Ladick on or about March 14, 1995, at his home in Colorado seeking to collect from him a common area maintenance assessment which was levied upon Ladick as a separate interest owner of SAMLARC. Van Gemert's letter did not contain the validation notice or the debt collection warning prescribed by Sections 1692g(a) and 1692e(11), respectively, of the Fair Debt Collection Practices Act ("FDCPA") (App. 18a-20a).

In the wake of this communication from Van Gemert, Ladick brought this civil action in the District Court for the District of Colorado against Van Gemert and his law firm

alleging a violation of the FDCPA, seeking a declaratory judgment to that effect and requesting a statutory award of damages. He invoked the jurisdiction of the District Court because of the federal question involved (28 U.S.C. §1331) and pursuant to the express terms of the FDCPA itself, 15 U.S.C. §1692k(d)(App. 24a).

Following the filing of Van Gemert's answer and some discovery, both he and Ladick filed motions for summary judgment. After considering the written and oral arguments of counsel, the District Court, Daniel, J., allowed Van Ge mert's summary judgment motion (App 7a-9a). In his memorandum of decision filed March 20, 1997, the District Judge found that the common area assessment sought to be collected by Van Gemert was not a "debt" within the mean- ing of the FDCPA and he accordingly allowed summary judgment in Van Gemert's favor (App. 8a-9a).

Upon Ladick's appeal, the United States Court of Appeals for the Tenth Circuit reversed the District Judge's ruling andremanded for further proceedings, holding that the condominium assessment sought to be collected by Van Gemert was a "debt" within the FDCPA (App. 1a-6a). Guided by its recent decision in *Snow v. Riddle*, 143 F.3d 1350 (10th Cir. 1998), the court of appeals in an opinion authored by Anderson, J., first determined that even though a condominium assessment does not involve an extension of credit and may resemble a tax, it was nevertheless a "debt" under the FDCPA (App. 3a- 4a).

The FDCPA's definition of "debt" is

> any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which

> the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family or household purpose, whether or not such obligation has been reduced to judgment.

(App. 11a). Relying upon its prior reasoning in *Snow*, the court ruled that the plain meaning of this statutory definition does not require that there be an offer or extension of credit in order for an obligation to qualify as a "debt" within the FDCPA (App. 4a).

The court of appeals then ruled that the obligation to pay a common area assessment arising out of the purchase of the condominium itself as a covenant running with the property amounted to a "transaction" for the purposes of the FDCPA's definition of debt (App. 5a). Even though the FDCPA's provisions did not define the term "transaction," the court ruled as a matter of law that Ladick's purchase of the condo minium unit was an event which triggered his duty to pay the common area assessments pursuant to the governing docu ments of the association and was therefore a qualifying "trans- action" within Section 1692a(5) of the FDCPA (App. 5a).

Finally, the court concluded that even though the assessment concerned the upkeep of common areas, it nevertheless had a primarily personal, family or household purpose as required by the FDCPA's definition of "debt" (App. 6a).

The decision of the court of appeals was filed on June 9, 1998 (App. 1a). Van Gemert has duly filed this petition for writ of certiorari to the Court of Appeals for the Tenth Circuit within ninety (90) days of the entry of this order.

Reasons For Granting The Writ.

1. The Decision Below Is In Direct Conflict With The Decisions Of Other Courts Of Appeals Which Have Addressed The Important Federal Question Of Identifying The Nature Of The "Debt" Contem- plated By The FDCPA And The Kind Of "Transaction" It Was Reasonably Intended To Encompass.

The FDCPA allows consumers who have been subjected to abusive, deceptive and unfair debt collection practices to recover damages, attorney's fees and costs. 15 U.S.C. §1692k(a). A threshold requirement for application of the FDCPA is that the prohibited practices be employed in an attempt to collect a "debt." See *Mabe v. G.C. Servs. Ltd. Partnership*, 32 F.3d 86,88 (4th Cir. 1994), *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1167 (3rd Cir. 1987). The salient circumstance giving rise to the existence of a "debt" for purposes of the FDCPA is that it be an obligation of a consumer to pay money arising from a transaction whose subject is primarily for personal, family or household purposes. 15 U.S.C. §1692a (5).

Van Gemert submits that there is a substantial conflict among the circuit courts of appeals concerning the reach of the FDCPA and that this conflict warrants the granting of his petition in order to resolve this important federal question. Specifically, the circuit courts are divided on the crucial questions of what kinds of "debt" the FDCPA contemplates and the nature of the "transaction" which should invoke its provisions.

A. The Meaning of "Debt" Within the FDCPA.

By the plain terms of the FDCPA, not all obligations by consumers to pay money are considered "debts" subject to this statutory scheme. Rather the FDCPA may be triggered only when an obligation to pay arises out of a specified "transaction." *Hawthorne v. Mac Adjustment*, Inc., 140. F.3d 1367, 1371 (11th Cir. 1998). In *Zimmerman v. HBO Affiliate Group*, 834 F.2d at 1168-1169, the Third Circuit held that the type of transaction which gives rise to a "debt" within the FDCPA is "one involving the offer or extension of credit to a consumer [..., i.e.,] a transaction in which a consumer is offered or extended the right to acquire 'money, property, insurance or services'...and to defer payment." Id. Thus a cable television company which sought monetary compensa- tion from the plaintiff for unlawfully pirating microwave television signals was not collecting a "debt" within the meaning of the FDCPA because no offer or extension of credit was involved. Id. at 1169. See also *Staub v. Harris*, 626 F.2d 275,277-279 (3rd Cir. 1980)(per capita tax levied by taxing district is not a "debt" within FDCPA).

In *Azar v. Hayter*, 874 F. Supp. 1314, 1318-1319 (N.D. Fla.), *aff'd Azar v. Hayter*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 712 (1996), the court relied upon the reasoning of *Zimmerman* and *Staub* to conclude that condominium fees imposed upon unit owners for the main tenance of the common areas did not constitute a debt within the FDCPA because the sums did not reflect deferred pay- ments on a prior debt and because there was no evidence of a pro tanto exchange. *Id. Accord, Riter v. Moss & Bloomberg, Ltd.*, 932 F. Supp. 210, 211-212 (N.D. Ill. 1996)(condomin ium fees are not "debts" for purposes of FDCPA); *Archer v. Beasley*, 1991 WL 34889 (D.N.J.1991)(same).

The law of the Third and Eleventh Circuits thus requires an extension of credit and a *pro tanto* exchange in order for delinquent condominium fees to be characterized as a "debt" within the FDCPA; and it would therefore exclude from this statutory scheme the actions of Van Gemert in collecting delinquent condominium fees from Ladick on this record.

In contrast to this law, the Seventh Circuit in *Bass v. Stolper, Koritzinsky, Brewster & Neider*, 111 F.3d 1322, 1325-1326 (7th Cir. 1997) has concluded that there is "no language in the Act's definition of 'debt' (or any other section of the Act) that mentions, let alone requires, that the debt arise from an extension of credit." *Id.* at 1325; 1327. Instead, the *Bass* court determined that as long as a given transaction creates an obligation to pay, a debt is created regardless of whether credit is extended. Id. In reaching this result, it expressly rejected *Zimmerman's* reading of the FDCPA since "the conduct in *Zimmerman* falls outside the reach of FDCPA for the reason that pirating television signals did not amount to a 'transaction' at all, arguably the true basis for decision in *Zimmerman*." *Id.* at 1326.

Bass involved a law firm's efforts to collect funds in the wake of the dishonor of a check by a co-holder of the plaintiff's bank account. *Id.* at 1323. In cases involving dishonored checks and whether such dishonor created the kind of debt which would invoke the protection of the FDCPA, *Bass'* reasoning has been followed by the courts of appeals for the Eighth and the Ninth Circuits. See *Duffy v. Landberg*, 133 F.3d 1120, 1123 (8th Cir. 1998)(abusive collection practices concerning a dishonored check are prohibited by the FDCPA); *Charles v. Lundgren & Associates, P.C.*, 119 F.3d 739, 742 (9th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 627 (1997)(same).

In *Snow v. Riddle*, 143 F.3d 1350 (10th Cir. 1998), the Tenth Circuit has joined this collection of circuits which have followed *Bass* when the debt asserted to be within the FDCPA is created by a bad check. The lower court here expressly relied upon *Snow* in applying that decision concerning a bad check to this case involving the collection of common interest maintenance assessments.

Van Gemert thus submits that there is a substantial conflict among the circuits on the issues of (1) whether an extension of credit is required in order to constitute a debt under the FDCPA; and (2) whether a condominium maintenance fee is the kind of debt entitled to the protection of that statutory scheme. Those circuits following *Zimmerman* or *Azar* would not find that the common interests maintenance assessment here was a debt within the meaning of the FDCPA. Those circuits following *Bass* and its progeny would so find. This conflict among the circuits is serious and substantial and warrants resolution by this Court.

Van Gemert further submits that the better reasoned decisions are those represented by *Zimmerman* and *Azar*. In the first place, this is not a bad check case and the court of appeals here was wrong to apply the logic of its prior decision in *Snow*, a bad check case, to this action involving an assess ment of condominium common area fees. Such assessments do <u>not</u> represent deferred payment of a present or prior debt as with a dishonored check. In fact, a condominium fee works in reverse fashion by requiring payment <u>prior to the time</u> when the common area goods and services are provided. There is no extension of credit involved and no cognizable "debt" within the FDCPA.

In the second place, *Bass'* statutory analysis of the FDCPA is fundamentally flawed. That court could find absolutely no language in the Act requiring that a "debt" arise from an extension of credit. 111 F.3d at 1325; 1327. In fact, however, the Act's definition of "creditor" means "any person who offers or extends credit creating a debt or to whom a debt is owed...." (App. 11a). (emphasis supplied).

The plain language of the FDCPA itself is the touchstone of what the Act means in fact. *Heintz v. Jenkins*, 514 U.S. 291, 297(1995). *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475(1992). The FDCPA's definition of "creditor" is the only portion of the statutory scheme which addressed the creation of a "debt." If Congress did not intend to limit the creation of a debt to extensions of credit, it could have defined "creditor" simply as "anyone to whom a debt is owed." *Bass'* analysis of the FDCPA ignores completely this crucial language concerning the creation of debt by exten- sions of credit and renders it meaningless surplusage, all in violation of established principles of this Court mandating that all language of an enactment be given effect. *Hughey v. United States*, 495 U.S. 411, 415(1990). *Mallard v. United States District Court*, 490 U.S. 296, 300-301(1989). *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337-339(1979)

B. The Nature Of The "Transaction" Contemplated By The FDCPA.

As the federal district judge observed in *Thies v. Law Office of William A. Wyman*, 969 F. Supp. 604, 606 (S.D. Cal. 1997), "[t]here is considerable confusion and conflict in the federal courts as to what a 'transaction' is for the purposes of [the FDCPA]." Id. The word "transaction" is one of flexible

meaning, *Moore v. New York Cotton Exchange*, 270 U.S. 593,610 (1926), and the FDCPA does not define the nature of a "transaction" which may give rise to a "debt." See *Zimmer man*, 834 F.2d at 1167. But the term is not necessarily ambiguous. Its ordinary meaning implies some type of business dealing between two parties which is consensual or contractual in nature. *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d at 1371 quoting Webster's New Collegiate Dictionary 1230 (1979) (defining "transaction" as a "business deal"). *Accord, Coretti v. Lefkowitz*, 965 F. Supp. 3, 5(D.Conn. 1997).

Even the Seventh Circuit in *Bass* has acknowledged that the "transaction" contemplated by the FDCPA is one arising from consensual relations where the parties themselves negotiate or contract for consumer-related goods or services. 111 F.3d at 1326. It does not contemplate obligations which are thrust upon the parties as the result of forces outside of their relationship which have nothing to do with their agreement, such as with a tax. See *Hawthorne v. Mac adjustment, Inc.*, 140 F.3d at 1371; *Bass, supra*; *Staub v. Harris*, 626 F.2d at 278.

Van Gemert submits that the common area maintenance assessment at issue here is precisely the kind of obligation which was not the product of any consensual arrangement between Ladick and the common interest development asso ciation. Much like a superlocal tax, the assessment is thrust upon Ladick as a necessary incident to his separate interest ownership in SAMLARC. It arose by force of statutory mandate, not as the result of any agreement between Ladick and the association.

Indeed, the established law of California has recognized that such community association assessments amount to equitable servitudes running with the land and are imposed by

law upon the unit owner irrespective of any agreement between him and the homeowners' association. *Nahrsdedt v. Lakeside Village Condominium Association, Inc.*, 878 P.2d 1275,1281-83; 1286(Cal.1994) and cases cited.

Moreover, because these equitable servitudes are recorded and imposed to benefit only the common property, these assessments could never be fairly described as transactions whose purpose is primarily related to personal, family or household ends so as to constitute a "debt" within the FDCPA. See *Mabe v. G.C. Services Limited Partnership*, 32 F.3d at 88; *Dance v. Petty, Livingston, Dawson & Devening*, 881 F. Supp. 223,225 (W.D. Va.1994). Contrast *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477, 481(7th Cir. 1997); *Thies*, 969 F. Supp. at 607.

2. The Decision Below Implicitly Preempts California's Davis-Stirling Enactment Regulating Common In terest Developments And Thereby Violates The Tenth Amendment To The Federal Constitution.

The Tenth Amendment provides that the "powers not dele- gated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Even though this amendment provides no substantive limitation on the United States, it reinforces the notion that the federal government possess only the powers that have been given to it by the federal Constitution – and no more. *New York v. United States*, 505 U.S. 144, 154-158 1992). In this respect, the federal government has no granted or inherent power to direct the internal affairs of a State and where by legislation it crosses the line from encouragement to coercion, it violates the federalism principles embodied in the Tenth Amendment. *Id.* at

175-177. "It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed...." *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218,230-231(1947).

There can be no question on this record that the ruling below by the Tenth Circuit not only undermines the State's Davis-Stirling enactment governing common interest devel opments but also preempts that statutory scheme, one that embodies every protection offered Ladick by the FDCPA except for the consumer warning and the 30-day verification of debt. But even as to this latter requirement, the state enact ment mandates that the basis of the debt be provided the homeowner in the initial communication. See Cal. Civ. Code, §1367(App. 39a-40a).

California's regulation of common interest developments and the collection of common area maintenance assessments is pervasive and the lower court's ruling implicitly preempts that regulation without reason in violation of Tenth Amendment principles. *National League of Cities v. Usery*, 426 U.S. 833, 842-843(1976) quoting *Fry v. United States*, 421 U.S. 542(1975).

Where a state law provides protection to the consumer equal to or greater than the FDCPA, it should not be preempted by the federal statute. The Davis-Stirling enactment does just that and deserves to have independent vitality beyond the reach of the FDCPA.

Congress' intent in enacting the FDCPA was to "eliminate abusive debt collection practices...." See 15 U.S.C. §1692(a) (App. 10a). While the Congressional findings refer in the generic to "existing laws" being "inadequate to protect cons

umers," there is nothing in Congress' declaration of purpose which would justify the wholesale supplanting of California's statutory scheme involving the operation of common interest developments, as the Tenth Circuit has, in effect, accom plished in this case. Its implicit preemption of the California statutory scheme is therefore against the law and violates the Tenth Amendment to the United States Constitution.

Conclusion.

For all of these reasons, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Tenth Circuit and, ultimately, to vacate the judgment and remand the cause to the District Court for the entry of a new judgment in Van Gemert's favor.

Respectfully submitted,

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FILED
United States Court of Appeals
Tenth Circuit

JUN 9 1998

PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ANDREW LADICK,

Plaintiff - Appellant,

v.

GERALD J. VAN GEMERT; LAW OFFICES OF GERALD J. VAN GEMERT, a professional corporation,

Defendants - Appellees.

No. 97-1147

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. NO. 96-D-581)

O. Randolph Bragg, Horwitz, Horwitz & Associates, Chicago, Illinois (Vincent C. Todd, Lakewood, Colorado, with him on the briefs), for Appellant.
Gerald J. Van Gemert (James A. Judge with him on the brief), Gerald J. Van Gemert, P.C., Irvine, California, for Appellees.

Before **ANDERSON**, **EBEL**, and **HENRY**, Circuit Judges.

ANDERSON, Circuit Judge.

The question presented in this appeal is whether an assessment owed to a condominium association qualifies as a "debt" within the meaning of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692*o*. Guided by our recent decision in Snow v. Riddle, -- F.3d --, No. 97-4045, 1998 WL 233383 (10th Cir. May 11, 1998), which interprets the term "debt" under the FDCPA, we hold that it does. We therefore reverse the district court's contrary judgment and remand for further proceedings.

BACKGROUND

Andrew Ladick brought this action in federal district court against Gerald J. Van Gemert and the Law Offices of Gerald J. Van Gemert ("Mr. Van Gemert"), seeking declaratory judgment and statutory damages for violations of the FDCPA. Mr. Ladick alleged that Mr. Van Gemert, an attorney, sent him a letter on behalf of a California condominium association demanding payment of a past-due condominium assessment fee. According to the complaint, the letter violated the FDCPA in that it failed to give a "validation notice" and did not expressly disclose that Mr. Van Gemert was attempting to collect a debt and that any information obtained would be used for that purpose. See 15 U.S.C. §§ 1692g, 1692e. After both parties moved for summary judgment, the district court found that the condominium assessment sought to be collected by Mr. Van Gemert was not a "debt" under the FDCPA and granted summary judgment in favor of Mr. Van Gemert and his law firm. Mr. Ladick appeals.

DISCUSSION

"We review the grant or denial of a motion for summary judgment de novo, applying the same legal standard used by the district court pursuant to Fed. R. Civ. P. 56(c)." Sender v. Simon, 84 F.3d 1299, 1303 (10th Cir. 1996). Where there is no genuine issue of material fact in dispute, we determine whether the substantive law requires judgment for the moving party. Id.

Under the FDCPA, a "debt"

> means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5). Mr. Van Gemert argues that the condominium assessment does not involve an extension of credit, and is more like a tax than a debt. In particular, he asserts that the assessment at issue here is more like a tax because it is similar to a municipality levying a tax on its residents. See Appellees' Br. at 10-13.

Just last month, in Snow v. Riddle, -- F.3d --, No. 97-4045, 1998 WL 233383 (10th Cir. May 11, 1998), we stated that under the plain meaning of this statutory definition, "an offer or extension of credit is not required for a payment obligation to constitute a 'debt' under the [FDCPA]." Id. at *4. This conclusion is consistent with the Seventh Circuit's holding in Bass v. Stolper, Koritzinksy, Brewster & Neider, S.C., 111 F.3d 1322, 1326 (7th Cir. 1997), as well as the holdings of several other circuits which have addressed this issue. See, e.g., Duffy v. Landberg, 133 F.3d 1120, 1123-24 (8th Cir. 1998); Charles v. Lundgren & Assoc., P.C., 119 F.3d 739, 742 (9th Cir. 1997); Brown v. Budget Rent-A-Car Sys., Inc., 119 F.3d 922, 924 (11th Cir. 1997). But see Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1168-69 (3d Cir. 1987) (construing the FDCPA as requiring an offer or extension of credit).

It is but a small step from our holding in Snow to the resolution of Mr. Van Gemert's additional argument. Mr. Van Gemert argues that even if an extension of credit is not necessary, the condominium assessment at issue here still does not qualify as a debt because Mr. Ladick's obligation to pay did not arise from a "transaction" within the meaning of the FDCPA. Appellees' Br. at 14. In particular, he asserts that in order to qualify as a debt, the obligation to pay the assessment must arise from a specific transaction or agreement with the condominium association. Id. at 2, 4, 14-15. According to this argument, Mr. Ladick's condominium purchase did not constitute such an agreement. We reject this argument, and instead follow the reasoning of the Seventh Circuit in Newman v. Boehm, Pearlstein & Bright, Ltd., 119 F.3d 477 (7th Cir. 1997), which, building upon its reasoning in Bass, held that the obligation to pay a condominium assessment arises in connection with the purchase of the condominium itself. Newman, 119 F.3d at 481; see also Thies v. Law Offices of William A. Wyman, 969 F. Supp. 604, 607 (S.D. Cal. 1997) (applying Newman and holding that the obligation to pay homeowners association fees based on a covenant running with the property constituted a "transaction" within the meaning of the FDCPA). Under this reasoning, Mr. Ladick became obligated upon purchasing his condominium unit to pay any assessments pursuant to the governing documents of his assocation, the Rancho Santa Margarita Recreation and Landscape Corporation, as well as under the California statute addressed to condominium property. See Appellant's App. at A-30; Davis-Stirling Common Interest Development Act, Cal. Civ. Code §§ 1350-77. The assessment at issue in this case therefore qualifies as an "obligation of a consumer to pay money arising out of a transaction." 15 U.S.C. § 1692*a*(5).

We recognize that not all such obligations are "debts" under the FDCPA because the money, property, insurance, or services which are the subject of the transaction must be primarily for "personal, family, or household purposes." Id. On this issue, we also follow the reasoning of the Seventh Circuit and hold that although the assessment at issue here is used to maintain and repair the common area, it nevertheless has a primarily personal, family, or household purpose. See Newman, 119 F.3d at 481; see also Thies, 969 F. Supp. at 607-08 (applying Newman and holding that homeowner association fees for maintenance and improvement of common areas are a service primarily for personal, family, or household use). Therefore, we conclude that the condominium assessment owed by Mr. Ladick to his condominium association qualifies as a debt under the FDCPA.

CONCLUSION

Accordingly, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

FILED
UNITED STATES DISTRICT COURT
DENVER COLORADO

MAR 20 1997

JAMES R. MANSPEAKER
CLERK
BY _____
DEP. CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ANDREW LADICK,

Plaintiff,

v.

GERALD J. VAN GEMERT; LAW OFFICES OF GERALD J. VAN GEMERT, a professional corporation,

Civil Action No. 96 D 581

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come before the Court pursuant to Plaintiff's Motion for Summary Judgment and Defendants' Motion for Summary Judgment. The Court having read the briefs of the parties, considered the arguments of counsel and being fully advised of its premises, the Court finds as follows:

1. That homeowners' assessments are not debts under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq. (the "Act").

2. The reasoning of the case decided in other federal district courts holding that homeowners' assessments are not debts under the Act is persuasive to this Court. See Ritter v. Moss & Bloomberg, Ltd. 932 F.Supp. 210 (N.D. Ill. 1996); Azar v. Hayter, 874 F. Supp. 1314 (N.D. Fla 1995), aff'd Azar v. Hayter, 66 F.3d 342 (11th Cir. 1995); Vosatka v. Wolin-Levin, Inc. 1995 WL 443950 (N.D. Ill. 1995); Nance v. Petty, Livingston, Dawson & Devening, 881 F.Supp. 223 (W.D. Va. 1994); Archer v. Beasley, 1991 WL 34889 (D. N.J. 1991). This Court chooses to follow the existing case law holding that homeowners' assessments are not debts under the Act.

IT IS THEREFORE ORDERED:

1. Defendants' Motion for Summary Judgment is granted.

2. Plaintiff's Motion for Summary Judgment is denied.

DATED this 19th day of March, 1997.

BY THE COURT:

Wiley Y. Daniel
United States District Court Judge

APPROVED AS TO FORM:

COHEN BRAME & SMITH
Professional Corporation

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ATTORNEY FOR PLAINTIFF

§ 1692. Congressional findings and declaration of purpose

• (a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy. • (b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers. • (c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts. • (d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce. • (e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to

promote consistent State action to protect consumers against debt collection abuses.

§ 1692a. Definitions

As used in this subchapter -

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As used in this subchapter -

·(1) The term "Commission" means the Federal Trade Commission. ·(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium. ·(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt. ·(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another. ·(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. ·(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly

collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include -

·(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor; ·(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts; ·(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties; ·(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt; ·(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and ·(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii)

concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

·(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment. ·(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 1692b. Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall -

•(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer; •(2) not state that such consumer owes any debt; •(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information; •(4) not communicate by post card; •(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and •(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not

communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

§ 1692c. Communication in connection with debt collection

•(a) Communication with the consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt -

•(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location; •(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or •(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

• (b) Communication with third parties

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector. • (c) Ceasing communication

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except -
• (1) to advise the consumer that the debt collector's further efforts are being terminated; • (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or • (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. If such notice from the consumer is made by mail, notification shall be complete upon receipt.
• (d) "Consumer" defined

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

§ 1692d. Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

•(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person. •(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader. •(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) of this title. •(4) The advertisement for sale of any debt to coerce payment of the debt. •(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number. •(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

•(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof. •(2) The false representation of

•(A) the character, amount, or legal status of any debt; or
•(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
•(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney. •(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action. •(5) The threat to take any action that cannot legally be taken or that is not intended to be taken. •(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to -
•(A) lose any claim or defense to payment of the debt; or
•(B) become subject to any practice prohibited by this subchapter.
•(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer. •(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed. •(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a

false impression as to its source, authorization, or approval. •(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer. •(11) Except as otherwise provided for communications to acquire location information under section 1692b of this title, the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose. •(12) The false representation or implication that accounts have been turned over to innocent purchasers for value. •(13) The false representation or implication that documents are legal process. •(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization. •(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer. •(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

•(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement

creating the debt or permitted by law. •(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit. •(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution. •(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument. •(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees. •(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if -

•(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; •(B) there is no present intention to take possession of the property; or •(C) the property is exempt by law from such dispossession or disablement.

•(7) Communicating with a consumer regarding a debt by post card. •(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

§ 1692g. Validation of debts

• (a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing

• (1) the amount of the debt; • (2) the name of the creditor to whom the debt is owed; • (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; • (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and • (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

• (b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a

judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. •(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

§ 1692h. Multiple debts

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

§ 1692i. Legal actions by debt collectors

•(a) Venue

Any debt collector who brings any legal action on a debt against any consumer shall -
•(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or •(2) in the case of an

action not described in paragraph (1), bring such action only in the judicial district or similar legal entity -
•(A) in which such consumer signed the contract sued upon; or •(B) in which such consumer resides at the commencement of the action.

•(b) Authorization of actions

Nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors.

§ 1692j. Furnishing certain deceptive forms

•(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.
•(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 1692k of this title for failure to comply with a provision of this subchapter.

§ 1692k. Civil liability

•(a) Amount of damages

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of -

•(1) any actual damage sustained by such person as a result of such failure; •(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

•(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

•(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

•(b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors -

•(1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

•(2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of noncompliance by

the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

•(c) Intent

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. •(d) Jurisdiction

An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs. •(e) Advisory opinions of Commission

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

§ 1692l. Administrative enforcement

•(a) Federal Trade Commission

Compliance with this subchapter shall be enforced by the Commission, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another agency under subsection (b) of this section. For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule. •(b) Applicable provisions of law

Compliance with any requirements imposed under this subchapter shall be enforced under -

•(1) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), in the case of -

•(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency; •(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25(a) (FOOTNOTE 1) of the Federal Reserve Act (12 U.S.C. 601 et seq., 611 et seq.), by the Board of Governors of the Federal Reserve System; and

(FOOTNOTE 1) See References in Text note below. •(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;
•(2) section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation; •(3) the Federal Credit Union Act (12 U.S.C. 1751 et seq.), by the National Credit Union Administration Board with respect to any Federal credit union; •(4) subtitle IV of title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board; •(5) part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that part; and •(6) the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.) (except as provided in section 406 of that Act (7 U.S.C. 226, 227)), by the Secretary of Agriculture with respect to any activities subject to that Act. The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).
•(c) Agency powers

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In

addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law, except as provided in subsection (d) of this section. •(d) Rules and regulations

Neither the Commission nor any other agency referred to in subsection (b) of this section may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this subchapter.

•(1) The term "Commission" means the Federal Trade Commission. •(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium. •(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt. •(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another. •(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment. •(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly

collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include -

•(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor; •(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts; •(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties; •(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt; •(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and •(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii)

concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

•(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment. •(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 1692m. Reports to Congress by the Commission; views of other Federal agencies

•(a) Not later than one year after the effective date of this subchapter and at one-year intervals thereafter, the Commission shall make reports to the Congress concerning the administration of its functions under this subchapter, including such recommendations as the Commission deems necessary or appropriate. In addition, each report of the Commission shall include its assessment of the extent to which compliance with this subchapter is being achieved and a summary of the enforcement actions taken by the Commission under section 1692l of this title. •(b) In the exercise of its functions under this subchapter, the Commission may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 1692l of this title.

§ 1692n. Relation to State laws

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

§ 1692o. Exemption for State regulation

The Commission shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Commission determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

§1350.Title.

This title shall be known and may be cited as the Davis-Stirling Common Interest Development Act.

§1351. Definitions.

As used in this title, the following terms have the following meanings:

(a) "Association" means a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development.

(b) "Common area" means the entire common interest development except the separate interests therein. The estate in the common area may be a fee, life estate, an estate for years, or any combination of the foregoing. However, the common area for a planned development specified in paragraph (2) of subdivision (k) may consist of mutual or reciprocal easement rights appurtenant to the separate interests.

(l) " Separate interest" has the following meanings:

(1) In a community apartment project, "separate interest" means the exclusive right to occupy an apartment, as specified in subdivision (d).

(2) In a condominium project, "separate interest" means an individual unit, as specified in subdivision (f).

(3) In a planned development, "separate interest" means a separately owned lot, parcel, area, or space.

(4) In a stock cooperative, "separate interest" means the exclusive right to occupy a portion of the real property, as specified in subdivision (m).

Unless the declaration or condominium plan, if any exists, otherwise provides, if walls, floors, or ceilings are designated as boundaries of a separate interest, the interior surfaces of the perimeter walls, floors, ceilings, windows, doors, and outlets located within the separate interest are part of the common areas.

The estate in a separate interest may be a fee, a life estate, an estate for years, or any combination of the foregoing.

. . . .

§ 1354. Covenants and Restrictions in Declaration--Enforcement; Alternative Dispute Resolution; Filing of Civil Action .

(a) The covenants and restrictions in the declaration shall be enforceable equitable servitude, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these sevitudes may be enforced by any owner of a separate interest or by the association, or by both.

(b) Unless the applicable time limitation for commencing the action would run within 120 days, prior to the filing of a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction with a claim for monetary damages, other than association assessments, not in excess of five thousand

dollars ($5,000), related to the enforcement of the governing documents, the parties shall endeavor, as provided in this subdivision, to submit their dispute to a form of alternative dispute resolution such as mediation or arbitration. The form of alternative dispute, resolution chosen may be binding or nonbinding at the option of the parties. Any party to such a dispute may initiate this process by serving on another party to the dispute a Request for Resolution. The Request for Resolution shall include (1) a brief description of the dispute between the parties, (2) a request for alternative dispute resolution , and (3) a notice that the party receiving the Request for Resolution is required to respond thereto within 30 days of receipt or it will be deemed rejected. Service of the Request for Resolution shall be in the same manner as receipt or it will be deemed rejected. Service of the Request for Resolution shall be in the same manner as prescribed for service in a small claims action as provided in Section 116.340 of the Code of Civil Procedure. Parties receiving a request for Resolution shall have 30 days following service of the Request for Resolution to accept or reject alternative dispute resolution and, if not accepted within the 30-day period by a party, shall be deemed rejected by that party. If alternative dispute resolution is accepted by the party upon whom the Request for Resolution is served, the alternative dispute resolution shall be completed within 90 days of receipt of the acceptance by the party initiating the Request for Resolution, unless extended by written stipulation signed by both parties. The costs of the alternative dispute resolution shall be borne by the parties.

(c) At the time of filing a civil action by either an association or an owner or a member of a common interest development solely for declaratory relief or injunctive relief, or for declaratory relief or injunctive relief in conjunction

with a claim for monetary damages (1) not in excess of five thousand dollars ($5,000), related to the enforcement of the governing documents, the party filing the action shall file with the complaint a certificate stating that alternative dispute resolution has been completed in compliance with subdivision (b). The failure to file a certificate as required by subdivision (b) shall be grounds for a demurrer pursuant to Section 430.10 of the Code of Civil Procedure or a motion to strike pursuant to Section 435 of the Code of Civil Procedure unless the filing party certifies in writing that one of the other parts to the dispute refused alternative dispute resolution prior to the filing of the complaint, that preliminary or temporary injunctive relief is necessary, or that alternative dispute resolution is not required by subdivision (b), because the limitation period of bringing the action would have run within the 120-day period next following the filing of the action, or the court finds that dismissal of the action for failure to comply with subdivision (b) would result in substantial prejudice to one of the parties.

(d) Once a civil action specified in subdivision (a) to enforce the governing documents has been filed by either an association or an owner or member of a common interest development, upon written stipulation of the parties the matter may be referred to alternative dispute resolution and stayed. The costs of the alternative dispute resolution shall be borne by the parties. During this referral, the action shall not be subject to the rules implementing subdivision (c) of Section 68603 of the Government Code.

(e) The requirements of subdivisions (b) and (c) shall not apply to the filing of a cross-complaint.

(f) In any action specified in subdivision (a) to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs. Upon motion by any party for attorney's fees and costs to be awarded to the prevailing party in these actions, the court, in determining the amount of the award, may consider a party's refusal to participate in alternative dispute resolution prior to the filing of the action.

(g) Unless consented to by both parties to alternative dispute resolution that is initiated by a Request for Resolution under subdivision (b), evidence of anything said or of admissions made in the course of the alternative dispute resolution process shall not be admissible in evidence, and testimony or disclosure of such a statement or admission may not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(h) Unless consented to by both parties to alternative dispute resolution that is initiated by a Request for Resolution under subdivision (b), documents prepared for the purpose or in the course of, or pursuant to, the alternative dispute resolution shall not be admissible in evidence, and disclosure of these documents may not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(i) Members of the association shall annually be provided a summary of the provisions of this section, which specifically references this section. The summary shall include the following language.

"Failure by any member of the association to comply with the prefiling requirements of Section 1354 of the Civil Code

may result in the loss of your rights to sue the association or another member of the association regarding enforcement of the governing documents."

The summary shall be provided either at the time the pro forma budget required by Section 5016 of the Corporations Code.

(j) Any Request for Resolution sent to the owner of a separate interest pursuant to subdivision (b) shall include a copy of this section.

§ 1365. Financial Documents.

Unless the governing documents impose more stringent standards, the association shall prepare and distribute to all its members the following documents.

. . . .

(d) A statement describing the association's policies and practices in enforcing lien rights or other legal remedies of default in payment of its assessments against its members shall be annually delivered to the members during the 60-day period immediately preceding the beginning of the association's fiscal year.

§1366. Regular and Special Assessments.

(a) Except as provided in this section, the association shall levy regular and special assessments sufficient to perform its obligations under the governing documents and this title. However, annual increases in regular assessments for any fiscal year, as authorized by subdivision (b), shall not

be imposed unless the board has compiled with subdivision (a) of Section 1365 with respect to that fiscal year, or has obtained the approval of owners, constituting a quorum, casting a majority of the votes at a meeting or election of the association conducted in accordance with Chapter 5 (commencing with Section 7510) of Part 3 of Division 2 of Title 1 of the Corporations Code and Section 7613 of the Corporations Code. For the purpose of this section, "quorum" means more than 50 percent of the owners of an association.

. . . .

(c) The association shall provide notice by first-class mail to the owners of the separate interests of any increase in the regular or special assessments of the association, not less than 30 nor more than 60 days prior to the increased assessment becoming due.

(d) Regular and special assessments levied pursuant to the governing documents are delinquent 15 days after they become due. If an assessment is delinquent the association may recover all of the following.

(1) Reasonable costs incurred in collecting the delinquent assessment, including reasonable attorney's fees.

(2) A late charge not exceeding 10 percent of the delinquent assessment or ten dollars ($10), whichever is greater, unless the declaration specifies a late charge in a smaller amount, in which case any late charge imposed shall not exceed the amount specified in the declaration.

(3) Interest on all sums imposed in accordance with this section, including the delinquent assessment, reasonable

costs of collection, and late charges, at an annual percentage rate not to exceed 12 percent interest, commencing 30 days after the assessment becomes due.

. . . .

§1366.3 Alternative Dispute Resolution – Application; Limitations.

(a) The exception for disputes related to association assessments in subdivision (b) of Section 1354 shall not apply if, in a dispute between the owner of a separate interest and the association regarding the assessments imposed by the association, the owner of the separate interest chooses to pay in full to the association all of the charges listed in paragraphs (1) to (4), inclusive, and states by written notice that the amount is paid under protest, and the written notice is mailed by certified mail not more than 30 days from the recording of a notice of delinquent assessment in accordance with Section 1367; and in those instances, the association shall inform the owner that the owner may resolve the dispute through alternative dispute resolution as set forth in Section 1354, civil action , and any other procedures to resolve the dispute that may be available through the association.

(1) The amount of the assessment in dispute.

(2) Late charges.

(3) Interest.

(4) All fees and costs associated with the preparation and filing of a notice of delinquent assessment, including all mailing costs, and including attorney's fees not to exceed four hundred twenty-

five dollars ($425).

(b) The right of any owner of a separate interest to utilize alternative dispute resolution under this section may not be exercised more than two times in any single calendar year, and not more than three times within any five calendar years. Nothing within this section shall preclude any owner of a separate interest and the association, upon mutual agreement, from entering into alternative dispute resolution for a number of times in excess of the limits set forth in this section. The owner of a separate interest may request and be awarded through alternative dispute resolution reasonable interest to be paid by the association on the total amount paid under paragraphs (1) to (4), inclusive, of subdivision (a), if it is determined through alternative dispute resolution that the assessment levied by the association was not correctly levied.

§1367. Lien for Assessments; Enforcement.

(a) A regular or special assessment and any late charges, reasonable costs of collection, and interest, as assessed in accordance with Section 1366, shall be a debt of the owner of the separate interest at the time the assessment or other sums are levied. Before an association may place a lien upon the separate interest of an owner to collect a debt which is past due under this subdivision, the association shall notify the owner in writing by certified mail of the fee and penalty procedures of the association, provide an itemized statement of the charges owed by the owner, including items on the statement which indicate the principal owed, any late charges and the method of calculation, any attorney's fees, and the collecting practices used by the association, including the right of the association to the reasonable costs of

collection. In addition, any payments toward such a debt shall first be applied to the principal owed, and only after the principal owed is paid in full shall such payments be applied to interest or collection expenses.

(b) The amount of the assessment, plus any costs of collecting, late charges, and interest assessed in accordance with Section 1366, shall be a lien on the owner's interest in the common interest development from and after the time the association causes to be recorded with the county recorder of the county in which the separate interest is located, a notice of delinquent assessment, which shall state the amount of the assessment and other sums imposed in accordance with Section 1366, a legal description of the owner's interest in the common interest development against which the assessment and other sums are levied, the name of the record owner of the owner's interest in the common interest development against which the lien is imposed, and, in order for the lien to be enforced by nonjudicial foreclosure as provided in subdivision (d) the name and address of the trustee authorized by the association by the association to enforce the lien by sale. The notice of delinquent assessment shall be signed by the person designated in the declaration or by the association for that purpose, or if no one is designated, by the president of the association, and mailed in the manner set forth in Section 2924b, to all record owners of the owner's interest in the common interest development no later than 10 calendar days after recordation. Upon payment of the sums specified in the notice of delinquent assessment, the association shall cause to be recorded a further notice stating the satisfaction and release of the lien thereof. A monetary penalty imposted by the association as a means of reimbursing the association for costs incurred by the association in the repair of damage to common areas and

facilities of which the member of the member's guests or tenants were responsible may become a lien against the member's separate interest enforceable by the sale of the interest under Sections 2924, 2924b, and 2924c, provided the authority to impose a lien is set forth in the governing documents. It is the intent of the Legislature not to contravene Section 2892.26 of Title 10 of the California Code of Regulations, as that section appeared on January 1, 1996, for associations of subdivisions that are being sold under authority of a subdivision public report, pursuant to Part 2 (commencing with Section 11000) of Division 4 of the Business and Professions Code.

(c) Except as indicated in subdivision (b), a monetary penalty imposed by the association as a disciplinary measure for failure of a member to comply with the governing instruments, except for the late payments, may not be characterized nor treated in the governing instruments as an assessment which may become a lien against the member's subdivision interest enforceable by the sale of the Interest under Sections 2924, 2924b, and 2924c.

(d) A lien created pursuant to subdivision (b) shall be prior to all other liens recorded subsequent to the notice of assessment, except that the declaration may provide for the subordination thereof to any other liens and encumbrances.

[1](e) After the expiration of 30 days following the recording of a lien created pursuant to subdivision (b), the lien may be enforced in any manner permitted by law, including sale by the court, sale by the trustee designated in the notice of delinquent assessment, or sale by a trustee substituted pursuant to Section 2934a. Any sale by the trustee shall be conducted in accordance with the provisions

of Sections 2924, 2924b, and 2924c applicable to the exercise of powers of sale in mortgages and deeds of trusts.

[2](f) Nothing in this section or in subdivision (a) of Section 726 of the Code of Civil Procedure prohibits actions against the owner of a separate interest to recover sums for which a lien is created pursuant to this section or prohibits an association from taking a deed in lieu of foreclosure.

[3](g) This section only applies to liens recorded on or after January 1, 1986.

Supreme Court, U.S.
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No. 98-474

In The

Supreme Court of the United States

October Term, 1998

GERALD J. VAN GEMERT and THE LAW OFFICES OF GERALD J. VAN GEMERT, a professional corporation,

Petitioners,

vs.

ANDREW LADICK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent Andrew Ladick objects to the Question Presented by Petitioners in their Petition for Writ of Certiorari (Petition at page i) and proposes the following Question Presented:

> Does an assessment owed to a condominium association arising from the purchase of a residence qualify as a "debt" within the meaning of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* ("FDCPA")?

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REASONS FOR DENYING THE WRIT

I.

NO SPLIT OF AUTHORITY EXISTS IN THE UNITED STATES COURTS OF APPEALS.

Petitioners Gerald J. Van Gemert and the Law Offices of Gerald J. Van Gemert first argue that a conflict exists among the decisions of the United States Courts of Appeals which have addressed this issue. Petition at 7-11. Petitioners are wrong. There is no split among the circuits.

Two United States Courts of Appeals have addressed the issue of whether a condominium assessment is a "debt" subject to the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* ("FDCPA"). In both cases, the circuit courts have held that such an assessment is a "debt" as defined by the statute.

The Petition for Writ of Certiorari arises from the decision in *Ladick v. Van Gemert*, 146 F.3d 1205 (10th Cir. 1998). The Tenth Circuit most recently concluded "that the condominium assessment owed by Mr. Ladick to his condominium association qualifies as a debt under the FDCPA." *Id.* at 1207. In reaching its decision, the Tenth Circuit relied upon *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997), (as well as upon *Theis v. Law Offices of William A. Wymana*, 969 F. Supp. 604 (S.D. Cal. 1997)). *Also, see Taylor v. Mount Oak Manor Homeowners Association*, __ F. Supp.__, 1998 WL 312545 (D. Md. May 22, 1998). In *Newman*, the Seventh Circuit held that a condominium assessment, as well as a homeowner's assessment, is a "debt" under the FDCPA. No other circuit court has addressed to question.

The cases which petitioners' cite for a split among the circuits are inapposite here. They do not address the

condominium fee question raised here and instead rely on discredited dicta from *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1165 (3d Cir. 1987), which states that a "debt" must arise from an extension of credit even though there is no such requirement in the statutory definition. *Zimmerman* involved an attempt by video programming services (HBO) to halt microwave "signal 'piracy' in its service areas" through which persons who were not subscribers to the service but who had "a proper antenna and converter can receive the programming without paying for it." Mr. Zimmerman was suspected of being such a signal pirate and received a demand letter which threatened litigation to recover civil damages under the Federal Communications Act of 1984 if he did not agree to terms stated in the letter, including paying a $300 non-negotiable "settlement" figure. *Id.* at 1165-66. Mr. Zimmerman sued under the FDCPA for various violations of the Act. *Id.* at 1167. "The district court found that the defendants demand for $300 represented a settlement offer for potential tort liability and was not a 'debt' within the meaning of the FDCPA," and the Third Circuit affirmed. *Id.*

The Third Circuit examined the definition of "debt" in the FDCPA and focused on the key word "transaction." The *Zimmerman* court concluded:

> While the concept of a "transaction" is broader than that of a contract and may describe negotiations which have been only partly brought to a conclusion, nothing in the statute or legislative history leads us to believe that Congress intended to equate asserted tort liability with asserted consumer debt.

Id. at 1168. To this extent, the *Zimmerman* decision is unremarkable and arguably a correct decision interpreting the definition of "debt" under the FDCPA. Mr. Zimmerman had

never entered into any business relations with HBO and had neither purchased or attempted to purchase anything from them. The result and reasoning to this point affirmed the holding of the trial court and were consistent with the extant case law (*Staub v. Harris*, 626 F.2d 275 (3d Cir. 1980)) and the conclusion of the FTC:

> The term ["debt"] does not include: [u]npaid taxes, fines, alimony, or tort claims, because they are not debts incurred from a transaction (involving purchase of) property . . . or services . . . for personal, family, or household purposes.

53 Fed. Reg. at 50102.

However, *Zimmerman* did not end its discussion with the quoted language, although that holding fully resolved the issue presented. Instead it continued with the following:

> We find the type of transaction which may give rise to a "debt" as defined in the FDCPA, **is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act**, i.e., one involving the offer or extension of credit to a consumer. Specifically it is a transaction in which a consumer is offered or extended the right to acquire "money, property, insurance, or services" which are "primarily for household purposes" and to defer payment.

Id. at 1168-69 (emphasis added). The district court decisions cited by defendants adopted this dicta from *Zimmerman* without analysis and held that the lack of an extension of credit removed the debt from those defined by the FDCPA. The Third Circuit in *Zimmerman* offered no explanation for this statement,

conducted no examination of the other chapters of the Consumer Credit Protection Act and did not perceive that its attribution to them of a universal focus on credit transactions is incorrect. While the Truth In Lending Act, 15 U.S.C. §§ 1601 *et seq.*, does require the extension of credit, other chapters of the Consumer Credit Protection Act, *i.e.* — Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.*, Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 *et seq.* — do not. The *Zimmerman* court also overlooked the FDCPA's definition of "creditor" with its disjunctive distinction between credit extenders and others "to whom a debt is owed". The Third Circuit went beyond its holding disposing of the theft claim to make such a sweeping pronouncement on a matter unnecessary for its resolution of the question presented.

Petitioners also rely on *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla. 1995), *aff'd. without opinion*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 712, 133 L. Ed. 2d 666 (1996).[1] "Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which citation is made." Circuit Rule 36-2 of the Rules of the United States Court of Appeals for the Eleventh Circuit.[2] Because the Eleventh Circuit has not published an opinion on this issue, its affirmance without opinion of *Azar v. Hayter*,

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1. Circuit Rule 36-1 of the Rules of the United States Court of Appeals for the Eleventh Circuit authorizes the issuance of an affirmance without opinion in certain circumstances.

2. The Tenth Circuit has taken a similar position: "Unpublished orders and judgments of this court are not binding precedent, . . ." Circuit Rule 36.3 of the Rules of the United States Court of Appeals for the Tenth Circuit.

supra, has no binding effect. Therefore, the Eleventh Circuit has not decided the issue which is presently before this Court. Without an opinion the Eleventh Circuit cannot be considered to be in conflict with the decisions in *Ladick v. Van Gemert*, *supra*, and *Newman v. Boehm, Pearlstein & Bright, Ltd.*, *supra*.

Even if it were assumed that the Eleventh Circuit had taken a position on the question of whether homeowners or condominium assessments are debts within the ambit of the FDCPA that premise is weakened, if not destroyed, by the decision of *Brown v. Budget Rent-A-Car Systems, Inc.*, 119 F.3d 922 (11th Cir. 1997). Therein the Eleventh Circuit rejected the underpinnings of *Azar v. Hayter*, *supra*, and held: "Extension of credit is not a prerequisite to the existence of a debt covered by the FDCPA." 119 F.3d at 924 and n.1. Since *Zimmerman* every United States. Court of Appeals to consider the question of whether an extension of credit is necessary to create a "debt" covered by the FDCPA has held that such an extension of credit is not necessary. *Snow v. Riddle*, 143 F.3d 1350 (10th Cir. 1998); *Duffy v. Landberg*, 133 F.3d 1120 (8th Cir. 1998), *cert. denied*, __ U.S. __ (October 5, 1998); *Brown v. Budget Rent-A-Car Systems, Inc.*, *supra*; *Charles v. Lundgren*, 119 F.3d 739 (9th Cir. 1997); *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997). Illustrating its non-binding effect, the *Azar* decision is not mentioned in *Brown v. Budget Rent-A-Car Systems, Inc.*, *supra*, which in any event has invalidated it. Petitioners' citation to *Ritter v. Moss & Bloomberg, Ltd.*, 932 F. Supp. 210 (N.D. Ill. 1996) is also erroneous because this decision was overruled by the Seventh Circuit in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, *supra*.

Both circuit courts that have addressed the question presented are consistent in holding that a condominium assessment is a "debt" under the FDCPA. The five circuit courts that have ruled on the peripheral issue of whether an extension

of credit is a component of the statutory definition have also consistently held that it is not. The two federal district court decisions that are at odds with the holding below are no longer good law within their own circuits. And neither those district court decisions nor the discredited dicta in *Zimmerman* meet the exacting standard established by this Court in Rule 10(a) to warrant the granting of a writ of certiorari. No conflicting decisions exist in the United States Court of Appeals, the Petition for Writ of Certiorari should therefore be denied.

II.

PETITIONERS RAISE AN ARGUMENT WHICH WAS NOT MADE BELOW.

Petitioners' second argument for granting their Petition for Writ of Certiorari is that by application of the Tenth Circuit's decision the FDCPA preempted California's Davis-Stirling Enactment regarding common interest developments and thereby violated the Tenth Amendment to the United States Constitution. Petition at 13-15. While petitioners did discuss the California's Davis-Stirling Enactment below, this argument was not presented to the Tenth Circuit. Arguments may not be raised for the first time in petitions for writ of certiorari to the United States Supreme Court. *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990); *City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989); *United States v. Ortiz*, 422 U.S. 891, 898 (1975).

Furthermore, the findings and purpose of the FDCPA articulate the reasons for its enactment.

> (a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of

personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692. For these reasons it is appropriate for the FDCPA to provide consumers with greater protections than California's Davis-Stirling Enactment.

CONCLUSION

Both United States Courts of Appeals which have addressed this issue have concluded that a condominium assessment fee is a "debt" within the coverage of the FDCPA. Thus, there is not a split or conflict among the circuits, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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